No. 92-445

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In The

Supreme Court of the United States

October Term, 1992

CENTRAL BANK OF TAMPA, f/u/b/o R.W. MASHBURN, LAMAS ORIENTAL FOODS, INC. AND LAMAS, INC.,

Petitioner,

vs.

TRANSAMERICA INSURANCE GROUP,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Does the Eleventh Circuit's affirmance of the trial court's admission of certain evidence under Rule 803(5), Federal Rules of Evidence, conflict with any decision of any other circuit?

II. Did the admission of certain evidence pursuant to Rule 803(5), Federal Rules of Evidence, by the trial court, or the affirmance of this ruling by the Eleventh Circuit, constitute a departure from the accepted and usual course of judicial proceedings, pursuant to Rule 10, Supreme Court Rules, so as to invoke the discretionary jurisdiction of this Court?

III. Did the trial court's admission of certain evidence under Rule 803(5), Federal Rules of Evidence, deny petitioner any right of due process?

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Plaintiff and appellant below, and petitioner in this Court, Central Bank of Tampa (Central Bank), sued Transamerica Insurance Group (Transamerica), to establish coverage under a certain policy of fire insurance issued by Transamerica for which

Central Bank was a beneficiary. Transamerica answered the complaint, alleging the policy had been cancelled prior to the fire. Transamerica moved for summary judgment and supported its motion with the affidavit of a former Transamerica employee, Judy Garrabrant. In that affidavit, Garrabrant swore that she had prepared and mailed a Notice of Cancellation to Central Bank and three other interested entities at their addresses. Transamerica's motion for summary judgment was denied and the action went to trial by jury. At trial, Transamerica stipulated to all elements of Central Bank's case-in-chief and the parties agreed on the major elements of damages. The case was tried solely on the affirmative defense that the policy had been cancelled by Transamerica prior to the fire.

In its case, Transamerica called Garrabrant to the stand. Through Garrabrant's testimony, Transamerica established that:

1. Garrabrant had executed the affidavit submitted in support of the Motion for Summary Judgment;

2. Garrabrant had knowledge and recollection of the contents of the affidavit when she executed it. But, she did not have sufficient recollection currently to testify fully and accurately to the matters set forth in the affidavit;

3. The contents of the affidavit were fresh in Garrabrant's memory at the time she executed the affidavit;

4. The affidavit correctly reflected Garrabrant's knowledge when she executed it;

5. Garrabrant would not have executed the affidavit if it were not true.

The pertinent portions of Garrabrant's testimony are set out in the appendix. Petitioner took full opportunity to cross-examine Garrabrant, and the court also inquired as to the witness' recollection. Transamerica moved to have the contents of the affidavit accepted as recorded recollection under Federal Rule of Evidence 803(5) and read to the jury. Central Bank objected chiefly on the basis the witness' knowledge was not fresh when recorded. The trial court overruled the objection and the affidavit was read to the jury. The jury found Garrabrant credible, accepted her testimony and returned a verdict for Transamerica.

The pertinent dates are as follows: Garrabrant prepared and mailed the cancellation notices on June 3, 1986. The fire occurred on June 29, 1986. Garrabrant executed the affidavit on September 18, 1987. Garrabrant testified at trial on January 28, 1991 .

Central Bank appealed the verdict to the Eleventh Circuit arguing, in pertinent part, as follows:

The court erred in permitting this hearsay statement to be admitted as substantive evidence because:

1. The pertinent fact was not recorded by the witness but by the unidentified person or persons who prepared the affidavit fifteen (15) months after the event.

2. The address of the Bank did not appear in the Notice and there was no evidence regarding its source, except that it obviously was not obtained from the witness or the Notice.

3. It could not be pretended, and the witness didn't pretend, that she remembered on September 18, 1987, the exact addresses of

three entities in Tampa, Florida to whom she allegedly mailed copies of a Notice fifteen (15) months earlier in another employment.

4. The affidavit was prepared for the purpose of supporting the Insurance Company's defense of cancellation by an attorney or other knowledgeable agent after the filing of the action on the policy.

Additionally, the extreme unreliability of the affidavit as substantive evidence, even if it were admissible in corroboration, precludes its sufficiency to carry Defendant's burden of proof as the only evidence offered on the issue.

Initial Brief of Appellant Central Bank in the Eleventh Circuit.

The Eleventh Circuit affirmed, concluding in its unpublished opinion that each of the prerequisites for admission of Garrabrant's recorded recollection under Fed. R. Evid. 803(5) was satisfied. All other issues on appeal, including the attack on the sufficiency of the evidence, were summarily dismissed for want of merit. This petition of Central Bank followed.

Petitioner states in its petition that Garrabrant's affidavit was "fabricated" and submitted at trial with intent to deceive the trial court and jury. This is not true. Petitioner's Statement of Questions Presented gives the impression the trial court found, as a matter of fact or law, that Garrabrant's affidavit was fabricated and false and yet allowed it as evidence to establish an essential fact at trial, and further, that the Eleventh Circuit affirmed this imagined procedure.

Petitioner misleads this Court by giving this impression. The facts are as follows: Transamerica called affiant Garrabrant to the

stand and laid a foundation pursuant to Rule 803(5) to publish the affidavit to the jury. Petitioner cross-examined affiant as to the freshness of her recollection and objected to the publication on the basis her recollection was not fresh. The trial court found a proper foundation was set and overruled the objection. The jury found Garrabrant credible and accepted her testimony. The Eleventh Circuit found no error.

Thus, the only judicial determinations as to the status of the affidavit are the trial and appellate courts' rulings that the affidavit is admissible evidence; further, there has been only one determination of the truth of the affidavit, and that is the jury's verdict finding the contents of the affidavit to be true. There is no basis for petitioner to characterize this evidence as "fabricated" and false and claim that the respondent and the trial and appellate courts knew it to be such.

SUMMARY OF REASONS FOR DENYING THE WRIT

This Court need not review the Eleventh Circuit's holding that the trial court committed no error in admitting the recorded recollection under Fed. R. Evid. 803(5). The trial court considered the prerequisites for admission of this evidence as set out in Rule 803(5)and found that the evidence adduced from Garrabrant provided a sufficient foundation for its admission. Facts casting doubt on the ability of the declarant to recall the matter go to the weight of the evidence but not its admissibility. It was for the jury to weigh the evidence. The Eleventh Circuit's relatively simple task on appeal was to compare the evidence adduced to the requirements of Rule 803(5); its holding that sufficient evidence was presented to admit the evidence for the jury's consideration is supported by the record and does not conflict with any decision of any other circuit.

Therefore, the trial and appellate courts' actions do not

constitute a departure from the usual course of proceedings under Supreme Court Rule 10.

The due process clause of the Constitution is not involved in this case as the power of the court was not used to deny the petitioner of any property interest.

Petitioner petitions this Court to review the trial judge's discretionary ruling to admit certain evidence. This straightforward issue, addressed and resolved in the Eleventh Circuit, is not a proper one for this Court's consideration.

REASONS FOR DENYING THE WRIT

I.

THERE IS NO CONFLICT BETWEEN THE ELEVENTH CIRCUIT'S HOLDING AND ANY DECISION OF ANY OTHER CIRCUIT.

A. Background to Rule 803(5).

Federal Rule of Evidence 803(5) provides for the admission of certain hearsay evidence where that evidence constitutes "recorded recollection." Recorded recollection is defined in the rule as a

1. memorandum or record concerning a matter;

2. about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately;

3. shown to have been made or adopted by the witness when the matter was fresh in the witness' memory;

4. and to reflect that knowledge correctly.

The trial court exercises its discretion to determine if these four foundation requirements are satisfied. *United States v. Patterson*, 678 F.2d 774 (9th Cir. 1982). As the court explains:

> [A] district judge's ruling to admit evidence will not be overturned absent abuse of discretion. [citations omitted.] The trial judge has broad discretion in determining whether evidence is supported by proper foundation . . . Broad discretion for the trial judge is clearly intended under Fed. R. Evid. 803(5), as the advisory committee notes indicate: "No attempt is made in the exception to spell out the method of establishing the initial knowledge or the contemporaniety and accuracy of the record, leaving them to be dealt with as the circumstances of the particular case might indicate."

Id. at 778-779.

Once the trial judge determines that sufficient evidence has been provided as to the four elements of the foundation to allow presentation of the evidence to the jury, the contents of the memorandum are read into evidence. The document itself is not received. The truth of the contents is determined by the trier of fact.

Facts casting doubt on the ability of the declarant to recall the matters in question go to the weight of the testimony, but do not preclude admission of the statement. *United States v. Williams*, 571 F.2d 344, 349 (6th Cir. 1978). *See also United States v. Senak*, 527 F.2d 129, 139 (7th Cir. 1975), *cert. denied*, 425 U.S. 907 (1976) (party opposed admission of recorded recollection on the grounds

that matter was not fresh in declarant's mind when recorded; full cross-examination allowed on this point and court holds that issue of freshness was one that goes to the weight of the evidence and *not* its admissibility); *and see also, United States v. Edwards*, 539 F.2d 689, 692 (9th Cir. 1976) (veracity and freshness of declarant's statements, when made or adopted, are subjects for impeachment by cross-examination before the jury; statement need not be recorded at time of event and there is no time limit for declarant to have accurate recollection; the trial judge must be free to consider, on a case-by-case basis, whether or not to admit the evidence).

B. The Eleventh Circuit's holding does not conflict with any decision of any other circuit.

Petitioner urges the Eleventh Circuit's holding on the application of Rule 803(5) conflicts with eight decisions from other circuits. The petitioner is wrong, no conflict is demonstrated. All eight cases were cited by petitioner in its appellate brief to, and therefore were considered by, the Eleventh Circuit. The purported conflict for each case is addressed in turn:

1. *Dickinson Supply, Inc. v. Montana-Dakota Utilities Co.*, 423 F.2d 106 (8th Cir. 1970). This case is cited by petitioner for the proposition that a witness' signature on a statement does not satisfy the requirement that the witness' memory be fresh when the recollection is recorded.

Dickinson dealt with a witness who allegedly gave a statement to a fire marshal. At trial this witness denied making the statement and specifically denied the truth of the matters contained in the statement but he admitted his signature on the statement. The trial court allowed this statement to be received as substantive evidence over the witness' denials. This ruling was reversed on appeal. This case actually stands for the proposition that where the declarant specifically denies the truth of the recorded recollection, the

evidence cannot be received. *Id.* at 109, n.1. In light of this denial, the court held the mere signing of a document is not enough to establish its truthfulness and admissibility. The instant case contains no such problem as the declarant, Garrabrant, acknowledged she executed and adopted the statement and resolutely claimed the statement to be truthful. *Dickinson* does not preclude the result reached in this case. There is no conflict.

2. *Goings v. United States*, 377 F.2d 753 (8th Cir. 1967). This case is cited by petitioner apparently for the proposition that even where the declarant admits the truthfulness of the recorded recollection, it is error to admit the recorded recollection because to do so would allow trial by prepared statements.

Goings is a criminal case that expressly does *not* deal with past recollection recorded. *Id.* at 760, n.8. The government, in *Goings*, introduced the contents of a prior signed statement of a hostile witness under the guise of refreshing the witness' recollection. The Eighth Circuit held that introducing the prior statement by this subterfuge was error. The Eighth Circuit clearly and deliberately distinguished the recorded recollection rule, Rule 803(5), from the issue in *Goings*. Therefore, *Goings* is not relevant to the instant case.

3. *O'Malley v. U.S. Fidelity and Guarantee Co.*, 776 F.2d 494 (5th Cir. 1985). Petitioner apparently cites this case for the proposition that if the declarant testifies that he does not remember reading the recorded recollection, it must be rejected.

O'Malley actually speaks to the final requirement of Rule 803(5) stated above, that the recorded recollection be accurate. In this case, the Fifth Circuit held if the witness did not write the recording, he must at least testify that he read it and found it to be accurate. *Id.* at 500. In *O'Malley*, the witness could not do so as he had not read the report. *Id.* In this case, it is not contended

Garrabrant did not read the affidavit before signing it. To the contrary, Garrabrant testified that when she executed the affidavit, her memory of the facts was fresh and the contents of the affidavit were correct. Thus, the reason for rejecting the recorded recollection in *O'Malley* does not exist in this case.

4. *In re: Corrugated Container Antitrust Litigation*, 756 F.2d 411 (5th Cir. 1985). Petitioner cites this case for the proposition that the affidavit, the recorded recollection, should have been rejected because there was not specific testimony that the recording reflected the witness' knowledge correctly when the matter was fresh in memory. While this may be a correct reading of the cited case, it has no application to this case. Garrabrant specifically testified that the affidavit correctly reflected her knowledge when the matter was fresh in her memory. *See* testimony set forth in appendix.

5. *United States v. Judon*, 567 F.2d 1289 (5th Cir. 1978). Petitioner cites this case for the proposition that the failure of a witness to testify specifically that the recording correctly reflects the witness' knowledge when it was fresh in memory is reason for excluding the evidence.

The Fifth Circuit ruled, in *Judon*, that a piece of paper with a license tag number written on it should not have been admitted into evidence under Rule 803(5) because no proper predicate was laid. "In particular, there was no showing that the witness had insufficient recollection to enable him to testify fully and accurately at trial." *Id.* at 1294. This is the reason the Fifth Circuit held the trial court should have excluded the recorded recollection. The court then noted as an additional ground that the prosecution failed to adduce specifically that the witness recorded the recollection while the matter was fresh in his memory. *Id.* These concerns do not exist in this case. Garrabrant testified specifically both that she had no present recollection of the contents of the

recording and that the recording was made when the matter was fresh in her mind.

The *Judon* case also illustrates that the policy of discouraging the use of statements "carefully prepared for purposes of litigation under the supervision of attorneys, investigators, or claims adjusters", Fed. R. Evid. 803(5) advisory committee notes on 1972 proposed rules, is satisfied where the witness has insufficient recollection to enable her to testify fully at trial. In other words, so long as there is insufficient recollection at the time of trial, there is no danger of a "trial by affidavit" envisioned by the petitioner. The critical safeguard against such a danger, *i.e.*, the failure of current memory, is established in this case, as petitioner would readily admit.

6. *Cathey v. Johns-Manville Sales Corp.*, 776 F. 2d 1565 (6th Cir. 1985). Petitioner cites this case for the proposition that recorded recollection is not admissible under Rule 803(5) unless made when the matter was fresh in memory. Of course, this proposition is not in dispute. The trial judge in *Cathey* did not allow the asbestos-exposed plaintiff to refresh his recollection by referring to a list of products to which he may have been exposed. The list was developed by plaintiff during trial for the benefit of defendants, and was not intended to be used as a substitute for live testimony. *Id.* at 1582.

The plaintiff complained on appeal that pursuant to Rule 803(5), he should have been allowed to refer to the list while testifying. The reasons for the trial court's actions are not manifest from the opinion but the Sixth Circuit concluded the trial judge was correct in not allowing the plaintiff to refer to the list. The plaintiff was illiterate and the court stated "it is difficult to understand how a written exposure list could have assisted him. . . ." *Id.* Further, there was "little evidence to show that his exposure list correctly reflected fresh knowledge," *Id.* at 1583. Finally, "plaintiff had no

evidence to support the contention the list correctly reflected Mr. Cathey's actual exposure." *Id*.

The Sixth Circuit's affirmance of the trial judge's ruling highlights that it is for the trial court, as a matter of its discretion, to evaluate the adequacy of the evidence to satisfy foundation requirements for admission of evidence under Rule 803(5). In *Cathey,* the trial court determined that an inadequate foundation was laid. *Cathey* does not conflict with the case before this Court because of the presence, in this case, of evidence that the matters contained in the recorded recollection were, in fact, fresh in the mind of the declarant when recorded, and that the recording was accurate.

7. *Felice v. Long Island R.R. Co.*, 426 F.2d 192 (2d Cir. 1970). Petitioner cites this case for the proposition that the author of the recorded recollection, if not the declarant, must testify or the recorded recollection is inadmissible. This is an incorrect statement of the law and a misconstruction of *Felice*. The recorded recollection in *Felice* was a medical record made by a physician's employee. The witness, the physician, could not verify the record and did not adopt it, as provided in Rule 803(5). Thus, no foundation was laid to admit the evidence under Rule 803(5). *Id.* at 196. In the instant case, while Garrabrant did not draft the affidavit, she adopted it by signing it and swearing to the truthfulness of its contents. Because Garrabrant adopted the statement, the evidence was properly received. In *Felice* there was no adoption, and therefore the evidence should not have been received.

The law is clear, the drafter of the recording need not testify; only the witness who adopts the statement must testify. *United States v. Williams,* 571 F.2d 344, 348 (6th Cir. 1978) ("when the verifying witness has not prepared the report, but merely examined it and found it to be accurate, he has adopted the report, and it is therefore admissible"). The legislative history for adding the

"adoption" language to Rule 803(5), set out in 11 *Moore's Federal Practice*, Art. VII, p. 110, and cited in *Williams, supra*, reveals no requirement that the author or drafter of recorded recollection, as well as the declarant, testify before the recording is admissible. Petitioner cites no authority or precedent for its contrary reading of Rule 803(5).

8. *United States v. Schwartz*, 390 F.2d 1 (3d Cir. 1968). The petitioner cites this case for the proposition that where guarantees of truthfulness are outweighed by countervailing considerations, the recorded recollection should be excluded. There can be no quarrel with this general proposition. But *Schwartz* presents no conflict with the Eleventh Circuit's opinion in this case. *Schwartz* dealt with the admissibility of a letter drafted by one criminal co-defendant in the trial of the second codefendant. The letter was addressed to the judge in the first defendant's trial. The letter requested a lenient sentence and cast the blame for the crime on the second co-defendant. At the trial of the second co-defendant, the first co-defendant testified and repudiated both the accuracy of the letter as well as his signature.

The trial court permitted the government to introduce the letter as a prior inconsistent statement and received it as substantive evidence. The Third Circuit reversed stating that the guarantees of trustworthiness, *i.e.*, that it was actually prepared by the first co-defendant's attorney and that the witness admitted he would not sign something known by him to be false, were outweighed by the circumstances that the document "was made almost seven years after the events therein, and an obvious effort to obtain a light sentence, not under oath, and there was no opportunity for cross-examination. The imminence of sentence alone was conducive to falsification rather than to trustfulness." *Id.* at 5-6.

Schwartz sets out no rule of law that was ignored or

contradicted by the Eleventh Circuit. *Schwartz* only points out that the trial judge must balance the guarantees of truthfulness against countervailing considerations. In *Schwartz*, the balance tipped to exclusion. In this case, the trial judge found they tipped to admission. The facts of the two cases are far different and *Schwartz* does not command a result different than that reached in this case.

Even where the only guarantee of trustworthiness of the accuracy of the record is the declarant's assurance that he would not have signed or prepared the record unless he knew it to be true, the evidence will be admitted. 3 *Wigmore, Evidence,* 747 (Chadbourn Rev. 1970).

> Recall that the witness must be able *now* to assert that the record accurately represented his knowledge and recollection at the time . . . In general, it is conceded that when the witness' certainty rests on his usual *habit or course of business* in making memoranda or records, it is sufficient . . . Here the witness is really calling to his aid, not his specific business custom, but his general moral attitude; but, as a rule, the indication should be and is treated as sufficient.

Id. The trial judge asked Garrabrant:

> THE COURT: I believe you are telling us that you would not have signed it under oath if it were not true?
>
> THE WITNESS: Yes, sir.
>
> * * *
>
> THE COURT: Well, is that because of habit,

your custom of not to sign anything that is not factual if it's under oath?

THE WITNESS: Yes,sir.

(T40-41)

The conclusion of *Wigmore is* that this assurance, standing on its own, is legally sufficient to *admit* the evidence.[1] Once admitted past this minimal barrier, any conflict or weakness in the declarant's testimony goes to the *weight* of the evidence.

Petitioner never demonstrated that the evidence of trustworthiness was insufficient for *admission* of the recording. Petitioner can only point to weaknesses or purported inconsistencies in the evidence. But these weaknesses went only to the weight of the evidence, and to this issue, the jury spoke. Petitioner seeks to have the evidence reweighed by this Court, and if granted certiorari, will ask this Court to do so. Because the time for finding facts has passed, its petition should be denied.

II. There was no departure from usual course of proceedings requiring correction by this Court.

Respondent relies on its argument in section I, *supra,* that the ruling of the trial court was correct, and the affirmance by the Eleventh Circuit proper. As such, there was no departure from usual and ordinary course of proceeding requiring correction by this Court pursuant to Supreme Court Rule 10.

---

1. In this case, the guarantees of trustworthiness went far beyond this minimal requirement: Garrabrant unequivocally adopted the recording; swore to the truth of the contents when she signed the affidavit; she recalled the circumstances under which she signed the affidavit; swore the contents of the affidavit were fresh in mind when adopted; swore the contents of the affidavit correctly reflected her then-fresh recollection; swore she would not have executed the affidavit unless the contents were true and correct.

III. The petitioner's due process rights were not violated by the trial court.

The petitioner contends that the trial judge's ruling allowing the admission of the recorded recollection denied its due process rights. This argument is without basis. To invoke this Court's jurisdiction on the basis of a deprivation of constitutional right, petitioner must show that it was deprived of a liberty or property interest by virtue of some state action. Petitioner has been deprived of neither by the trial court's ruling. The cases cited by petitioner do not support its claims.

In *Societe Internationale, Etc. v. Rogers*, 357 U.S. 197 (1958), the interest involved was the plaintiff's right to bring its action before the court for hearing. The state action involved was the power of the court under Fed. R. Civ. P. 37(b) to dismiss the plaintiff's action for failure to comply with a pre-trial discovery order. This Court held that where such a failure is due to inability and not to bad faith, the power of the court should not be used to deprive a party of its right to be heard. Withholding its power to dismiss the action was particularly appropriate in the context of the suit, this Court held, where the federal government had seized, without notice, certain personal property of plaintiff.

No such seizure or deprivation of process occurred in this case. The trial court simply overruled petitioner's objection to the admission of certain evidence. Adverse evidentiary rulings, in private party civil cases, are not the usual stuff of due process violations, and this case presents no exception.

Schlagenhauf v. Holder, 379 U.S. 104 (1964), cited by petitioner, does not involve the due process clause and presents no basis for this Court to review the Eleventh Circuit's decision. Petitioner believes *Schlagenhauf* provides that granting a writ of certiorari is proper where the construction or application of a

Federal Rule of Evidence is contested. In *Schlagenhauf*, this Court granted a writ of certiorari "to review undecided questions concerning the validity and construction of Fed. R. Civ. Pro. 35." *Id.* at 109. But there are no undecided questions regarding the construction of Rule 803(5) raised in this case. What is contested is the *application* of the rule. But the contested application of a Rule of Evidence should not be grounds to involve this Court's jurisdiction. And certainly, this is not the result *Schlagenhauf* provides.

The balance of cases cited by petitioner in this section are opinions on criminal appeals. Criminal prosecutions clearly invoke due process concerns as the state is acting to deprive the defendants of their property and liberty interests. But no action of the state acting to deprive the petitioner of a property interest occurred in this case. These criminal cases are inappropriately cited. The argument is misplaced and does not properly call for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

Following are the pertinent excerpts from the trial transcript of the examination of witness Judy Garrabrant.

[Questions by Respondent's Counsel.]

Q. Let me show you a document which has not been marked for identification and ask you to examine it.

* * *

Q. Have you read that document? A. Yes, sir.

Q. What is that document entitled?

* * *

A. Oh, title? It's an affidavit.

* * *

Q. Does that document bear a signature? A. Yes, sir, it does.

Q. Whose signature? A. It has mine and the witness.

Q. Are you able to identify that as your signature? A. Yes, sir.

Q. What is the date on that document? A. The 18th of September, 1987.

Appendix A

Q. Is that a true and accurate copy of an affidavit signed by you on that date? A. Yes, sir.

Q. Now, do you presently today, Ms. Garrabrant, have sufficient recollection to enable you to testify fully and accurately about the matters set forth in that affidavit? A. No, I do not.

Q. However, at the time you swore the affidavit, were the matters set forth therein fresh in your memory at this time? A. Yes, sir.

Q. And at the time you swore the affidavit, did you have knowledge and recollection of the matters set forth in that affidavit? A. Yes I did.

Q. Since you stated that you signed that affidavit under oath, I assume it correctly reflects your knowledge at that time; is that a fair statement? A. Yes, sir, uh-huh.

[T 34-36].

Q. For clarification, Ma'am, do you presently recall that when you signed this affidavit, it was true? A. At the time I signed the affidavit, yes, I'm – I wouldn't have signed it if it wasn't true.

[T 42].

Appendix A

[Questions by petitioner's counsel]

Q. Do you recall the circumstances under which you signed that affidavit? A. Yes, I do.

[T 36].

Q. My question was that when you say you recall today that it was true then, is that because it was more recent in time? A. Right. It was fresher in my mind at that time, yes sir.

Q. Than today? A. Than today.

[T 43].

[Questions by the Court]

THE COURT: I believe you are telling us that you would not have signed it under oath if it were not true?

THE WITNESS: Yes, sir.

THE COURT: But you really have no recollection of the factual matters that may be contained in that affidavit?

THE WITNESS: Not at the present time.

THE COURT: And you don't remember whether you remembered it at the time you

signed it?

THE WITNESS: I don't think I would have signed it if I didn't remember.

THE COURT: Well is that because of habit, your custom of not to sign anything that is not factual if it's under oath?

THE WITNESS: Yes, sir.

[T. 40-41]